Supreme Court, U.S.
FILED
JAN 12 1998
CLERK

(5)

No. 97-801

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION IN SUPPORT OF PETITIONER

The National Defense Industrial Association ("Association") respectfully submits this brief as *amicus curiae* in support of the petitioner, Yankee Atomic Electric Company ("Yankee Atomic").[1]

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

The Association is a national organization consisting of more than 900 companies and 28,000 individual members. It is dedicated to three principal endeavors: First, the Association promotes awareness of the need for a strong defense posture among all elements of American society. Second, it identifies and studies problems affecting the common defense and national security of the United States. Third, the Association encourages mutual understanding and a close working relationship among American commerce and industry and those segments of the United States Government ("Government") responsible for the common defense and national security.

The Association and its members are deeply concerned about the Federal Circuit's decision in *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569 (Fed. Cir. 1997). This decision would permit the Government to

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1 No counsel for any party in this case authored this brief, either in whole or in part. No person or entity other than the Association has made a monetary contribution to the preparation or submission of this brief.

impose retroactive price increases on its private contracting partners decades after the completion of fixed-price contracts. Consequently, *Yankee Atomic* violates this Court's long-standing precedent, and particularly its recent decision in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996).[2]

SUMMARY OF ARGUMENT

If allowed to stand, the Federal Circuit's ruling would permit Congress to abrogate specific contractual obligations of the Government while escaping liability for breach of contract. The private sector no longer would be able to rely on the rule that the Government as contractor is subject to the same contract law principles as private parties. Until now, private contractors could have confidence that the Government cannot abuse its sovereign power to abrogate its contracts. The Federal Circuit's decision, however, sanctions such governmental manipulation. As a result, private parties now may become reluctant to contract with the Government, or at least may factor this additional risk into their contracts, thereby increasing the Government's and ultimately, the public's contracting costs.

This Court's immediate review is necessary because the Federal Circuit's opinion represents a fundamental misapplication of this Court's dictates in *Winstar*. The Federal Circuit misapplied two closely related Government defenses to breach of contract claims, both of which were the subject of *Winstar*: (1) the sovereign acts doctrine; and (2) the unmistakability doctrine. In addition, the Federal Circuit failed to recognize the possibility of a constitutional taking of Yankee Atomic's contractual rights. Unless reversed by this Court, the Federal Circuit's misapplication of these doctrines

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2 The Petitioner and the United States have consented to the filing of this brief. Their respective letters of consent are filed herewith.

and the lessons of *Winstar* will have a far-reaching and immediate impact not only on the utility industry, but on all businesses that contract with the Government.

Furthermore, the Government persists in misinterpreting or ignoring *Winstar* by raising the same arguments already rejected in *Winstar*. *See, e.g.*, *California Fed. Bank v. United States*, Nos. 92-138 C, 90-981 C, 95-502 C, 92-652 C, 1997 WL 780936, at *1 (Fed. Cl. Dec. 22, 1997) ("[T]he government wants to relitigate the core *Winstar* liability issues in every case."). There is no reason for the Court to defer reviewing these issues inasmuch as the Federal Circuit has exclusive jurisdiction over appeals involving monetary claims against the Government like this one and hence, an inter-circuit conflict will not arise. The Federal Circuit's profound misapplication of *Winstar* implicates this Court's supervisory authority over the lower courts to correctly apply the principles of *Winstar*.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT'S DECISION WILL DISCOURAGE PRIVATE PARTIES FROM CONTRACTING WITH THE GOVERNMENT

This Court should grant certiorari to review the Federal Circuit's decision in *Yankee Atomic* because that ruling jeopardizes the integrity of contracts between the Government and private parties, thereby deterring firms from contracting with the Government. The essence of the Federal Circuit's decision is that the Government, unlike private parties, can unilaterally reopen its previously closed fixed-price contracts decades after their completion and impose a retroactive price increase without any liability for breach of contract. Thus, the Federal Circuit would place the

Government and private parties on vastly unequal footing as contracting partners.

The decision would potentially render the Government untrustworthy as a contracting partner. Businesses may question the validity of the previously well-established precedent that when the Government enters into a contractual relationship, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Lynch v. United States*, 292 U.S. 571, 579 (1934); *see also Winstar*, 116 S. Ct. at 2451-52.

The Federal Circuit's ruling would erase the line between legislation that is general in applicability and legislation that is "tainted by a governmental object of self-relief." *Winstar*, 116 S. Ct. at 2465. Thus, Congress could abrogate the Government's contractual obligations while avoiding any liability for breach, contrary to the law established in *Winstar*, *Perry*, *Lynch*, and *Horowitz*. *See Winstar*, 116 S. Ct. at 2453; *Perry v. United States*, 294 U.S. 330, 341 (1935); *Lynch*, 292 U.S. at 579; *Horowitz v. United States*, 267 U.S. 458, 461 (1925). Those cases recognize the Government's dual capacities as a legislator and as a contractor. *See Horowitz*, 267 U.S. at 461. When acting as a legislator, the Government passes laws that affect the public in general, and such acts are not attributable to the Government as contractor for purposes of breach of contract liability. When the Government passes legislation with the effect of abrogating certain Government contracts, however, the Government as contractor becomes liable for breach. *See Winstar*, 116 S. Ct. at 2464-66 (citing *Deming v. United States*, 1 Ct. Cl. 190, 191 (1865)); *Horowitz*, 267 U.S. at 461.

In the instant case, Yankee Atomic's contract with the Government contained simple fixed-price terms, thereby shifting the risk of any increased costs from Yankee Atomic

as buyer to the Government as seller. Typically, "[w]hen parties contract for a price not to exceed a certain dollar figure, that necessarily carries the implication that the *seller bears the risk* that its costs will exceed that ceiling." *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1402 (9th Cir. 1993) (emphasis added). Moreover, the risk of increased costs was foreseeable here because this case involves a highly regulated industry with potentially high clean-up costs. "Contracts like this are especially appropriate in the world of regulated industries, where the risk that legal change will prevent the bargained-for performance is always lurking in the shadows." *Winstar*, 116 S. Ct. at 2452. When the Government demanded that its previous contracting partners bear an additional share of the decontamination and decommissioning costs of its uranium enrichment plants, it failed to honor its assumption of the risk of any increase in such costs, and thereby breached its fixed-price contracts.

Pursuant to *Winstar*, the Federal Circuit should have held that the Government breached the express fixed-price term in the contract, just as the Government in *Winstar* breached the express accounting arrangements between the Government and the acquiring institutions. *See id.* Under *Yankee Atomic*, however, the Government would be able to enact laws that have the effect of relieving the Government of its duty in fixed-price contracts to absorb the risk of increased costs as long as the legislation "appears" to be of general applicability, even if it actually is not.

The Federal Circuit improperly concluded that the Government did not breach its contract with Yankee Atomic, and wrongly characterized the Energy Policy Act of 1992

("Energy Act") as a public and general act of the sovereign.[3] The special assessment in the Energy Act, *see* 42 U.S.C. § 2297g-2(c) (1994), in effect focuses very narrowly on one group of contractors. This case involves the issue of how specifically aimed at a particular contract legislation must be to lose its characterization as a public and general act. Once it loses this characterization, the Government as contractor becomes liable for breach. The Government may also be liable even for its public and general acts if there is an "unmistakable" term in the contract which provides for such liability. The characterization of this legislation as a public and general act would compromise the Government's practical capacity to contract, as private parties would no longer be able to rely on the Government to honor its contractual obligations. *See Winstar*, 116 S. Ct. at 2459.

Congress certainly has the right as the sovereign to legislate for the benefit of the public at large. When legislation has the effect of abrogating specific Government contract rights, however, the Government is liable for breach unless the private contracting party has assumed the risk of such future legislation. Yankee Atomic did not assume that risk due to the nature of its fixed-price contract.

As in *Winstar*, it would "have been madness" for Yankee Atomic to have purchased uranium enrichment services from the Government knowing that the Government could later return to Yankee Atomic following the contract's completion and demand more money. *Id.* at 2472. Indeed, if

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3 As will be explained in Part II.A, the sovereign acts doctrine encompasses the idea of a "public and general act of the sovereign." The very name "sovereign acts doctrine" perhaps has contributed to the Federal Circuit's confusion in this area. Indeed, all legislative acts are "sovereign acts." For purposes of the doctrine, however, only acts that are "public and general" may be attributed to the Government as legislator.

the Federal Circuit's decision is allowed to stand, it would be madness for any private company to enter into a fixed-price contract with the Government for services. A promise to charge a fixed-price, "with a reserved right to deny or change the effect of the promise, is an absurdity." *Id.* at 2473 (Breyer, J., concurring) (quoting *Murray v. Charleston*, 96 U.S. 432, 445 (1878)).

Ultimately, the Federal Circuit's ruling could produce the untoward result of increasing the Government's long-term contractual costs. The private sector's lack of trust in the Government as contractor would create additional risks in contracting with the Government. Increased risks typically cause an increase in price. Private contractors could respond to the added uncertainty that the Government can impose a price change after the contract's completion by calculating such risk into the price of their contracts, thus increasing governmental contracting costs. Considering the enormous number of contracts into which the Government enters, the magnitude of the Federal Circuit's decision ultimately could be an immense cost to both the Government and the public. This Court should review the Federal Circuit's decision in *Yankee Atomic* to restore the public's confidence in the Government's contracts.

II. THE FEDERAL CIRCUIT'S DECISION VIOLATES THIS COURT'S DICTATES IN *WINSTAR*

The *Yankee Atomic* decision illustrates the Federal Circuit's fundamental misunderstanding of this Court's landmark opinion in *Winstar*, 116 S. Ct. 2432. The Federal Circuit misinterprets and misapplies two special defenses exclusively available to the Government which, if applicable, render the Government free of liability for breach of contract: (1) "the principle that a Government's sovereign acts do not give rise to a claim for breach of contract"; and (2) "the

canon of contract construction that surrenders of sovereign authority must appear in unmistakable terms." *Winstar*, 116 S. Ct. at 2448. In the instant case, these doctrines do not shield the Government from liability for breach of contract because the sovereign acts defense is inapplicable, and the question of whether the unmistakability doctrine applies is not reached.

The Federal Circuit, however, improperly applied these two defenses and concluded that the Government did not breach its contract with Yankee Atomic. The court of appeals ignored *Winstar* by determining that the special assessment imposed upon Yankee Atomic to help fund the Government's previously underestimated decontamination and decommissioning costs was general legislation. In reaching this conclusion, the Federal Circuit erred in two significant respects. First, the court improperly determined that the sovereign acts doctrine applies here because Congress enacted the special assessment for the benefit of the public. *Yankee Atomic*, 112 F.3d at 1577. Second, the court incorrectly decided that the unmistakability doctrine applies to the instant case. *Id.* at 1579. The Federal Circuit's conclusions are in direct conflict with *Winstar*, and warrants this Court's review.

Furthermore, the Federal Circuit improperly concluded that this is not a breach of contract case. The court concluded in a footnote that Yankee Atomic's contract rights no longer exist due to the contract's completion, and as such, this case does not entail a breach of contract. *See Yankee Atomic*, 112 F.3d at 1573 n.2. Contract rights *never cease to exist*, however; accordingly, this case does involve a breach. *See Perry*, 294 U.S. 330; *Lynch*, 292 U.S. 571. Courts can still apply contract principles to cases like this one despite the fact that the contracts are no longer executory.

A. The Sovereign Acts Defense Is Unavailable To The Government In This Case Because The Special Assessment Is Not A Public And General Act.

The sovereign acts doctrine balances the Government's need for freedom to legislate with its obligations to its contracting partners. *See Winstar*, 116 S. Ct. at 2465.

> It has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.

Horowitz, 267 U.S. at 461. In sum, "[t]he United States as a contractor are not responsible for the United States as a lawgiver." *Deming v. United States*, 1 Ct. Cl. 190, 191 (1865). The Federal Circuit, although facially acknowledging this difference, wrongly fused together these two "characters" of the Government, resulting in a misapplication of this Court's long-standing precedent. *Horowitz*, 267 U.S. at 461.

Not all regulatory action falls within the scope of the sovereign acts doctrine. *See Winstar*, 116 S. Ct. at 2465-66. The Government simply cannot conclude that "a given contractual commitment was no longer in the public interest" and, accordingly, seek to relieve itself of that particular commitment. Joshua I. Schwartz, *Assembling Winstar: Triumph of the Ideal of Congruence in Government Contracts Law?*, 26 PUB. CONT. L.J. 480, 520 (1997) (internal quotations and citations omitted). The proper inquiry is whether the act is attributable to the Government as contractor or to the Government as sovereign. *See Horowitz*,

267 U.S. at 461. Governmental acts remain those of the sovereign if they are "public and general." *Id.* All other acts are thus attributable to the Government as contractor, for which it can be held liable for breach of contract if the acts obstruct the performance of a particular contract. *See id.* This question is not necessarily answered by a statement of intent by Congress or by a search for *any* impact outside the particular group of the Government's contracting partners. Rather, the court must ascertain whether the primary impact of the legislation falls on a particular group of private contractors.

The Federal Circuit improperly focused on "purpose" rather than on "impact." *See Yankee Atomic*, 112 F.3d at 1576-77.

> Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's *impact* nonetheless falls substantially upon the Government's contracting partners.

Winstar, 116 S. Ct. at 2468 (emphasis added). If a legislative statement of purpose is the determinative factor under the sovereign acts doctrine analysis, then Congress could always cover its breaches by remaining silent.

In the instant case, despite any stated purpose of the special assessment in the Energy Act, its impact falls substantially on the Government's contracting partners who purchased uranium enrichment services. Therefore, this case does not involve public and general legislation.[4] It is

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4 Congress knows how to pass general tax legislation to raise revenues. The Internal Revenue Code amply demonstrates this fact. In an attempt to recover clean-up costs, however, Congress failed to pass general legislation here. *(Footnote continued on next page)*

immaterial that the legislation does not exclusively identify particular contracting partners of the Government. The special assessment contained in the Energy Act not only obstructs, but essentially nullifies, the fixed-price term of the Government's contract with Yankee Atomic. Consequently, the assessment is attributable to the Government as contractor, making it liable for breach of contract.

The Government's evident self-interest in the special assessment further demonstrates the Government's breach in this case.

> The greater the Government's self-interest . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence, and where a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations, the defense will be unavailable.

Winstar, 116 S. Ct. at 2466. The Government has displayed "self-interest" here by shifting its financial burden of the decontamination and decommissioning costs from the public's responsibility to Yankee Atomic and other similarly situated private contracting parties. Thus, the special assessment has the "substantial effect" of releasing the Government from its contractual obligation to maintain the

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While the Energy Act allows the power companies to pass on the metered fees for the decontamination and decommissioning costs, the power companies may be unable to pass on those fees to consumers. For example, companies like Yankee Atomic cannot forward the fees to its rate base because it is out of the nuclear power business altogether.

fixed-price term of the contract, and is not merely incidental to a broad governmental objective. *See Winstar*, 116 S. Ct. at 2466; *Horowitz*, 267 U.S. at 461.

Congress purposefully and outrageously abrogated specific Government contracts, an act which the Federal Circuit erroneously approved. The special assessment's retroactive price increase constitutes a breach of contract, as in *Winstar*, and the fact that the contract is no longer executory is irrelevant. The Federal Circuit profoundly misapplied this Court's dictates of *Winstar* to reach an invalid conclusion in this case. It is important to all private parties who contract with the Government that this Court grant certiorari in this case to correct the Federal Circuit's misinterpretation of *Winstar*.

B. The Federal Circuit Improperly Held That The Unmistakability Doctrine Applies To This Case

The sovereign power of the Government generally prohibits its agents from contracting away the Government's ability to regulate in the future. *See Winstar*, 116 S. Ct. at 2451-53; *Bowen v. Public Agencies Opposed to Social Sec. Entrapment*, 477 U.S. 41, 52 (1986) (hereinafter referred to as *"POSSE"*). This sovereign power "governs *all* contracts subject to the sovereign's jurisdiction, and will remain intact *unless surrendered in unmistakable terms*." *POSSE*, 477 U.S. at 52 (emphasis added). Without such an express promise, the sovereign power endures, even though unexercised. *See id.* Consequently, any public and general sovereign acts of the Government do not violate its contracts with private parties.[5] *See Horowitz*, 267 U.S. at 461. Thus,

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5 This concept of "public and general" acts personifies the sovereign acts doctrine, as previously discussed in Part II.A. There is significant overlap

(Footnote continued on next page)

absent an "unmistakable" provision to the contrary, "contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign." *See Winstar*, 116 S. Ct. at 2456 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147 (1982)).

> The Government cannot make a binding contract that it will not exercise a sovereign power, but it can agree in a contract that if it does so, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act.

Id. at 2458 (quoting *Amino Bros. Co. v. United States*, 178 Ct. Cl. 515, 525, 372 F.2d 485, 491 (1967)). Thus, a contract provision cannot provide a basis for an injunction without "unmistakable terms", but the parties can contractually provide for the risk of future legislation. *See id.* at 2453 (unmistakability doctrine only applies where injunctive relief is sought).

Here, it was unnecessary for the Federal Circuit to reach the question of whether the unmistakability doctrine applies. The unmistakability doctrine only comes into play where the legislation in question constitutes a public and general act, and the legislation in the instant case is not a public and general act of the sovereign. In this regard, the unmistakability doctrine is a rule of contract interpretation used to ascertain the intent of the parties. *See Winstar*, 116 S.

(Footnote continued from previous page)
between the two doctrines, to which this Court alluded in its various *Winstar* opinions. *See, e.g.*, *Winstar*, 116 S. Ct. at 2478 (Scalia, J., concurring). A grant of certiorari would give this Court the opportunity to clarify this relationship between the two defenses, and, more broadly, to clarify *Winstar* itself. The multiple opinions, including two concurrences and one dissent, may have contributed to the Federal Circuit's confusion.

Ct. at 2448; *id.* at 2477 (Scalia, J., concurring); *see also California Fed. Bank*, 1997 WL 780936, at *11 (following *Winstar*). The court must first determine whether the contract purports to prohibit public and general legislation. The court then must ascertain what the contract provides, either expressly or impliedly, regarding the effect of public and general acts on the contracting parties. As previously explained in Part II.A., a retroactive price increase having a substantial effect on specific contracting parties is not a public and general act, as would be, for example, an increase in the income tax or a minimum wage statute. Therefore, in this case there is no need to determine whether the Government contracted away its ability to legislate in the future. Rather, the analysis ends with the determination that the special assessment contained in the Energy Act is not a public and general act.

Perhaps a simple illustration will clarify the interrelationship between the two doctrines. Suppose a contractor agrees to provide a product to the Government for a fixed-price of $1,000. During performance of the contract, Congress passes a law that increases the minimum wage, which applies to all employers and employees throughout the United States. Such legislation would constitute a public and general act, and would be attributable to the Government as legislator rather than to the Government as contractor. The Government as buyer would not have to pay a higher price because the private contractor, as the seller, had assumed the risk of any cost increases. *See Winstar*, 116 S. Ct. at 2456 (sovereign power governs all contracts subject to sovereign's jurisdiction).

The private contractor could have protected itself against the risk of increased costs occasioned by a public and general act in various ways. One way would have been to include in the contract an "unmistakable" provision that in

the event of a change in the minimum wage law, the contract price would be altered accordingly. *See id.* Such a provision would not affect the ability of Congress to legislate generally, but rather would address specifically the allocation of the risk of increased costs. However, absent a public and general act, the unmistakability provision is not reached. There is no need to determine the intent of the parties regarding an event that did not occur.

Even if there is a public and general act, it is not necessary to look for an unmistakable term if the contract impliedly addresses the issue. *See id.* at 2474 (Breyer, J., concurring). Had the contract in the example been a cost reimbursement contract, the buyer would pay the increased labor costs, not because of a second unmistakable contract term, but rather because the risk of increased costs impliedly had been assumed by the buyer by the nature of the contract. There is no need for an additional "unmistakable" provision expressly stating what the contract already impliedly addresses.

In the instant case, a second unmistakable provision was not necessary because the contract impliedly addresses the issue. The contract was for a fixed-price, which assured Yankee Atomic that the price it paid to the Government for acquiring services would not change. This guarantee does not *preclude* public and general acts, but instead leaves the Government liable for such acts.

Yankee Atomic's contract did not need an unmistakable provision covering future legislation that effectively increases contractual costs. The fixed-price term already allocated this risk to the Government. Consequently, the Government must absorb its previously underestimated costs. Ultimately, then, the Federal Circuit did not need to look for an "unmistakable term."

Even if the question of unmistakability were reached, the doctrine does not apply here. The Federal Circuit improperly held that the unmistakability doctrine applies, and wrongly expanded the scope of that doctrine beyond both the plurality and concurrences of *Winstar*. The court of appeals apparently erroneously determined that honoring the fixed-price term in Yankee Atomic's contract effectively would enjoin the Government's ability to legislate in the future when it stated that the "unmistakability doctrine turns on whether enforcement of the contractual obligation would effectively block the exercise of a sovereign power of the Government." *Yankee Atomic*, 112 F.3d at 1579. From that faulty premise, the Federal Circuit concluded that the contract needed a second promise that the Government will compensate the contractor for the actions of Congress that effect price. The fixed-price term does not prohibit Congress from enacting public and general legislation. Therefore, there is no need for a second promise because the fixed-price term implies such a promise.

Under *Winstar*, the mere payment of costs by the Government does not limit the Government's ability to legislate. The Federal Circuit misapplied the law of *Winstar*, wherein both the plurality and concurring justices agreed that the unmistakability doctrine does not apply where the contract provides for the risk. *See Winstar*, 116 S. Ct. at 2453; *id.* at 2474 (Breyer, J., concurring). The Federal Circuit's misapplication and expansion of *Winstar* mandates this Court's review.

III. EVEN IF THE GOVERNMENT'S RETROACTIVE PRICE INCREASE DOES NOT CONSTITUTE A BREACH OF CONTRACT, THE GOVERNMENT MUST NEVERTHELESS PAY JUST COMPENSATION PURSUANT TO THE FIFTH AMENDMENT'S TAKINGS CLAUSE

The Government's sovereign power to abrogate its contractual obligations is constitutionally limited by the Due Process and Takings Clauses.[6] Thus, any uncompensated breaches of contract may nevertheless require compensation pursuant to the Fifth Amendment. *See Perry v. United States*, 294 U.S. 330 (1935).[7] This Court should grant Yankee Atomic's petition because the Federal Circuit failed to recognize that there may be a Fifth Amendment taking in this case. *See Yankee Atomic*, 112 F.3d at 1580 n.8.

By contracting with a private party, the Government creates property rights which it cannot take for public use

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6 U.S. CONST. AMEND. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.").

7 When a breach of a Government contract arises, the private contractor may seek judicial review. *See* 28 U.S.C. §§ 1346, 1491 (1994); *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 465 n.5 (1980). In those rare cases in which there is no relief under the law for a breach of contract, the contractor may pursue just compensation under the Fifth Amendment due to the loss of its contractual rights obtained as a result of its contract with the Government. *See* U.S. CONST. AMEND. V; 28 U.S.C. §§ 1346(a)(2), 1491; *Narramore v. United States*, 960 F.2d 1048, 1050 (Fed. Cir. 1992). When a plaintiff presents alternative theories of recovery based on a breach of contract claim and takings rights under the Fifth Amendment, recovery on the breach of contract claim precludes recovery on the takings theory. *See Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 769, 572 F.2d 786, 817-18 (1978). However, when no action lies in contract, the Fifth Amendment may provide relief. *Cf. Wah Chang Corp. v. United States*, 282 F.2d 728 (Ct. Cl. 1960).

without just compensation. *See* U.S. CONST. AMEND. V; *Perry*, 294 U.S. 330. If the Government, after entering into a contract, subsequently alters its contractual obligations, it thereby takes the property of a private party. *See* U.S. CONST. AMEND. V. Such action is compensable to the property owner even where it would relieve the Government of significant financial burdens. *See Lynch*, 292 U.S. 571; *Perry*, 294 U.S. 330. The mere necessity for Government action does not provide the Government with the power to take such action without just compensation.

Here, the apparent purpose of imposing the special assessment was to ease the Government's financial burden which resulted from the clean-up costs of its uranium enrichment plants. While the special assessment may benefit the public as a whole by relieving a financial burden of the Government, the special assessment nevertheless takes property from private individuals. Specifically, the Government has taken Yankee Atomic's contractual rights, thereby requiring just compensation from the Government.

> If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.

James Madison, *Property* (1792), *reprinted in* 6 *The Writings of James Madison* 101, 103 (Gaillard Hunt ed., 1906), *quoted in Winstar v. United States*, 25 Cl. Ct. 541, 553 (1992).

IV. THIS COURT SHOULD NOT DELAY REVIEWING THIS CASE

The Federal Circuit has exclusive jurisdiction to hear appeals from the United States Court of Federal Claims concerning claims for monetary damages against the Government not sounding in tort. *See* 28 U.S.C. § 1295 (1994).[8] Accordingly, it would be futile for this Court to wait for an inter-circuit conflict to arise before addressing the issues presented in Yankee Atomic's petition for certiorari.

The Federal Circuit's decision necessitates the invocation of this Court's supervisory powers over the lower courts. The consequences of *Yankee Atomic* will be severe and far-reaching unless this Court immediately addresses the Federal Circuit's fundamental misinterpretation of this Court's dictates in *Winstar*. There are three primary groups of cases that *Yankee Atomic* will affect. The first group involves companies similarly situated to Yankee Atomic. As the *amicus curiae* brief for the several electric utility companies notes, at least twenty one cases have been filed in the Court of Federal Claims, and most have been stayed pending the outcome of this case. *See Brief in Support of Petitioner Filed by 31 Electric Utilities as Amici Curiae*. The second group consists of numerous *Winstar* progeny

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8 The Tucker Act, 28 U.S.C. §§ 1346, 1491, vests exclusive jurisdiction in the United States Court of Federal Claims to hear monetary claims over $10,000 against the United States founded either upon a contract or upon a provision of "the Constitution, or any Act of Congress, or any regulation of an executive department," 28 U.S.C. § 1491, that "'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *United States v. Mitchell*, 463 U.S. 206, 217 (1983) (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)); *see also Opal Mfg. Co. v. UMC Indus., Inc.*, 553 F. Supp. 131 (D.D.C. 1982) (jurisdiction is vested in Court of Federal Claims to exclusion of district courts). Thus, the Tucker Act constitutes a waiver of the Government's sovereign immunity from suit of the types of claims outlined in the Tucker Act. *See Mitchell*, 463 U.S. at 218.

cases. *See, e.g., California Fed. Bank*, 1997 WL 780936. The third group includes all other cases in which the Government has legislated to the detriment of its contracting partners.

If the Federal Circuit's *Yankee Atomic* decision is allowed to stand, the Court of Federal Claims, insofar as it cannot distinguish *Yankee Atomic*, will be compelled to apply the Federal Circuit's improper analysis to each future Government contract case, resulting in an unjust and costly outcome for each private contractor. Consequently, it is vital that this Court grant certiorari to immediately reaffirm *Winstar* and ensure that the lower courts apply it properly.

CONCLUSION

For the reasons stated above, the Association respectfully urges the Court to grant Yankee Atomic's Petition for a Writ of Certiorari.

Respectfully submitted,

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Dated: January 12, 1998